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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/697,767	10/30/2003	Andrew Schydlowsky	15651-002001	8887

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EXAMINER	
MCALLISTER, STEVEN B	
ART UNIT	**PAPER NUMBER**
3627	

DATE MAILED: 05/19/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/697,767	SCHYDLOWSKY, ANDREW	
	Examiner	Art Unit	
	Steven B. McAllister	3627	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on *06 March 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *26-34 and 45-49* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *26-34 and 45-49* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *30 October 2003* is/are: a)☐ accepted or b)☒ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Drawings

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, (cl. 47) that the dietary supplement product and the at least one additive package are combined into one package; (cl. 48) that the dietary supplement product is contained in a package, the package comprising a holder adapted to hold the at least one additive package; and (cl. 49) that the holder is integral with the dietary supplement package. must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner,

the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 26-34 and 45-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baron.

Baron shows a kit for making a product comprising a product; and at least one additive packaged separately from the product.

Baron does not explicitly show that the product is a dietary supplement product. However, the examiner takes official notice that it is notoriously old and well known in the art to provide a dietary supplement product (e.g., Baron shows unflavored milk. It is well known to provide a milk fortified with additional vitamins, etc.). It would have been obvious to one of ordinary skill in the art to modify the apparatus of Baron by providing a dietary supplement in order to provide a healthier product.

As to claims 29 and 31, Baron shows at least a chocolate flavorant or a pharmaceutical.

As to claim 46, the base item is in a first package and the additive package is held adjacent the first package in consuming the item.

As to claim 47, the base item and the at least one additive package are combined into one package during consumption.

As to claims 48 and 49, the TETRA-PACK package which contains the base item of Baron when configured for consumption comprises a holder (comprising e.g., an open hole for drinking into which the additive package is held) adapted to hold the at least one additive package.

As to claims 33 and 34, Baron shows all elements except providing a container having a plurality of servings and providing a plurality of individually packaged additives, the individually packaged additives equal to at least the number of single servings. However, the examiner takes official notice that it is notoriously old and well known in the art to do so. It would have been obvious to one of ordinary skill in the art to modify the apparatus of Baron by providing a container providing a plurality of servings and providing plurality of individually packaged additives at least equal to the number of single servings in order to allow the user to enjoy multiple flavored servings on multiple occasions without having to re-use the first additive package.

Claims 26-28, 30-32 and 45-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lloyd et al

Lloyd shows a kit for making a product comprising a product; and at least one additive packaged separately from the product.

Lloyd does not explicitly show that the product is a dietary supplement product. However, the examiner takes official notice that it is notoriously old and well known in the art to provide a dietary supplement product (e.g., Lloyd shows milk. It is well known to provide a milk fortified with additional vitamins, etc.). It would have been obvious to one of ordinary skill in the art to modify the apparatus of Lloyd by providing a dietary supplement in order to provide a healthier product.

As to claim 31, the additive (for instance Kix cereal as recited by Lloyd) provides nutrients (Kix Ingredients: corn meal, whole grain oats (included the oat bran), sugar, corn starch, canola oil, corn syrup, salt, calcium carbonate, modified corn starch, trisodium phosphate, wheat starch, vitamin E (mixed topopherols) added to retain freshness. Vitamins and minerals: iron and zinc (mineral nutrients), vitamin C (sodium ascorbate), a B vitamin (niacinamide), vitamin B6 (pyridoxine hydrochloride), vitamin B2 (riboflavin), vitamin B1 (thiamin mononitrate), vitamin A (palmitate), a B vitamin (folic acid), vitamin B12, vitamin D.)

As to all other dependent claims, it is noted that Lloyd shows all elements.

Response to Arguments

Applicant's arguments filed 3/6/2006 have been fully considered but they are not persuasive.

Applicant argues that "dietary supplement" should be interpreted narrowly as a term of art defined by Dietary Supplement Health and Education Act of 1994. The examiner respectfully disagrees. Rather, the examiner construes the term in its broadest reasonable meaning.

Applicant can be his own lexicographer, but the applicant has not defined the term in a clear an unambiguous way in the specification to have the meaning which is now argued.

Further, Applicant's discussion of a dietary supplement in the specification and his claim language explicitly contradict the narrow meaning of the term of art set forth in the Dietary Supplement Health and Education Act of 1994. As admitted by the Applicant, the Act construes a dietary supplement to contain "a vitamin, an herb or other botanical (excluding tobacco), an amino acid, a dietary substance for use by man to supplement the diet by increasing the total daily intake (e.g., enzymes or tissues from organs or glands), a concentrate, such as a meal replacement or energy bar, or a metabolite, constituent or extract". However, Applicant both claims and describes a dietary supplement containing pharmaceuticals instead dietary substances as contemplated by the Act.

Further, Applicant points to only one definition of a dietary supplement – that based on the Dietary Supplement Health and Education Act of 1994. However, evidence exists of usage of the term in broader usage.

The St. Jude's Children's Research Hospital defines a dieatary supplement as: "Vitamins, minerals, or other substances taken by mouth, and intended as an addition to the diet."

Scitec Laboratories defines the term as "Physical material that is usually relatively richer in a specific nutrient than the average food or food product. It may contain one or a mixture of vitamins, proteins, minerals, and other growth stimulants."

Therefore, since the Applicant has not expressly and unambiguously defined the term in the specification; since Applicant's description and claim language regarding a dietary supplement is contrary to that of the argued definition; and because there are other, competing definitions of the term in use, it is not proper to interpret "dietary supplement" narrowly, as argued by Applicant.

Regarding the subject matter which the examiner took official notice of as old and well known in the previous Office Action, it is noted that MPEP 2144.03(C) requires that to adequately traverse such a finding, an applicant must specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art. See 37 CFR 1.111(b). A general allegation that the claims define a patentable invention without any reference to the examiner's assertion of official notice would be inadequate. If applicant does not traverse the examiner's assertion of official notice or applicant's traverse is not adequate, the examiner should clearly indicate in the next Office action

that the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant either failed to traverse the examiner's assertion of official notice or that the traverse was inadequate. If the traverse was inadequate, the examiner should include an explanation as to why it was inadequate.

Applicant appears to provide no traversal of the examiner's taking of official notice. To the extent that the Applicant's noting of the official notice is intended as a traversal, the traversal is inadequate because it does not specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art. Since Applicant did not traverse the official notice, or the traversal was inadequate, the common knowledge or well-known in the art statement is taken to be admitted prior art.

The examiner notes that regarding the Baron rejections, Baron considers flavoring any unflavored liquid, not just milk (the discussion of milk in the rejection above is merely an example). For instance, the invention discusses flavoring mineral water. Although not explicitly shown in Baron, mineral water can be a dietary supplement (see for example, the two references – Nature'sAlternatives.com Boron Ionic Mineral Water and Nature'sAlternatives.com Ionic Chromium Mineral Water).

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

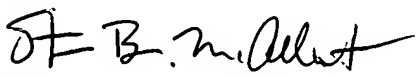
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven B. McAllister whose telephone number is (571) 272-6785. The examiner can normally be reached on M-Th 8-6:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Alexander G. Kalinowski can be reached on (571) 272-6771. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Steven B. McAllister
Primary Examiner
Art Unit 3627



Steven B. McAllister

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